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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., ADMINISTRATOR OF THE ESTATE OF L. T. McGEE, PETITIONER,

versus

EDMUND V. COLE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on January 7, 1964.

OPINIONS BELOW

The opinion of the District Court (App. 17-24) is reported in 217 Fed. Supp. 280, and the opinion of the Court of Appeals (App. 25-29) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on the 7th day of January, 1964 (App. 25). Petition for rehearing (App. 29) was denied on the 10th day of February, 1964 (App. 33). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether in actions tried by the court without a jury a district judge's findings of fact based upon conflicting inferences from undisputed evidence are subject to review and may be set aside by a federal appellate court when such findings are not clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

This case involves Rule 52 (a) of the Federal Rules of Civil Procedure, the South Carolina Wrongful Death Statute, Section 10-1951 *et seq.* of the Code of Laws for South Carolina, 1962, and the South Carolina Uniform Act Regulating Traffic on the Highways, Sections 46-201 *et seq.* of the Code of Laws of South Carolina, 1962, the pertinent parts of which are set forth below:

Rule 52 (a) of Federal Rules of Civil Procedure.

"In all actions tried upon the facts without a jury * * * the court shall find the facts specially * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

Section 10-1951, Code of Laws of South Carolina, 1962.

"Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death

had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured. * * *"

Section 10-1952, Code of Laws of South Carolina, 1962.

"Every such action shall be for the benefit of the * * * child * * * of the person whose death shall have been so caused. * * *"

Section 46-381 of the Code of Laws for South Carolina, 1962.

"Upon all roadways of sufficient width a vehicle shall be driven on the right half of the roadway. * * *"

Section 46-362 of the Code of Laws for South Carolina, 1962.

"* * * the speed of any vehicle not in excess of the limit specified * * * shall be lawful, such limits established in this section being:

3. 55 miles per hour * * *. Any speed in excess of such limit or limits established as herein otherwise authorized shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful."

Section 46-321 of the Code of Laws of South Carolina, 1962.

"The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 46-323. * * *"

STATEMENT

Petitioner, as administrator of the Estate of L. T. McGee, deceased, brought suit against respondent, Edmund V. Cole, under the wrongful death statute of South Carolina to recover damages for negligence and wantonness of respondent in driving his automobile to the left of the center of the highway (westbound lane), traveling at an excessive rate of speed and zigzagging along the highway in violation of the South Carolina statute law, as the result of which petitioner's intestate was struck and killed upon reaching the westbound lane while crossing the highway from the eastbound lane of travel, after which respondent fled the scene without rendering aid and assistance and leaving petitioner's intestate to die on the highway.

Respondent denied the ownership and operation of the offending vehicle and on this issue the evidence of record showed that the offending automobile fitted the description of respondent's automobile in minute details as to make, color, type, state and army post license tags and even as to damaged parts; and that respondent was in sole and exclusive possession of such automobile at the time of the fatality.

On the issues of negligence, wantonness and proximate cause, the evidence was undisputed that intestate's body was found lying on the highway in the westbound lane (respondent's wrong lane of travel), that it was badly crushed and mangled, that the offending vehicle was zigzagging along the highway at an excessive rate of speed, that it was being driven on its left or wrong side of the roadway (westbound lane), as crucially noted by the court below in footnote 1 of its opinion that "skidmarks on the highway at the site tended to confirm this, as they commenced in the eastbound lane, then crossed over just past the center line into the westbound lane at or near the location of the body.",

and that after petitioner's intestate was struck, the driver fled the scene without stopping to render aid and assistance.

Notwithstanding the foregoing undisputed evidence pertaining to the location of the body and the skid marks, and the compelling evidence identifying respondent as the owner and operator of the offending automobile, no explanation was offered by respondent at the trial for driving on the wrong side of the highway.

The case was tried without a jury and on the basis of the foregoing evidence, the Honorable C. C. Wyche, an outstanding and able trial judge of approximately twenty-five years' experience, who had served in the South Carolina Legislature and had sat as an acting associate judge of the South Carolina Supreme Court, applying his experience "with the main springs of human conduct", found from the circumstantial evidence of record that respondent Cole was the owner and operator of the automobile which struck and killed petitioner's intestate; and made further findings of fact based upon inferences from the undisputed evidence (open to conflicting inferences under South Carolina law) that respondent was negligent and wanton, that such negligence and wantonness proximately caused the death of petitioner's intestate and that the intestate was not guilty of contributory negligence. The court thus awarded damages against respondent in the amount of Twenty-five Thousand ($25,000.00) Dollars.

Upon appeal, the court below reversed the judgment of the district court. It by-passed ruling upon the correctness of the district judge's findings as to the issues of ownership and operation of the offending automobile. It predicated the reversal on its own independent findings of fact, based upon the conflicting inferences from the undisputed evidence, different from those reached by the district judge. It disregarded the broad experience of the district judge

with the "main springs of human conduct" and, treating the findings of fact as conclusions of law, found and concluded; that, notwithstanding the mangled and crushed condition of the body indicating the excessive rate of speed at which the automobile was traveling and the testimony concerning the zigzagging and excessive speed of the offending automobile, the speed was not the proximate cause of the fatality; and also, notwithstanding the undisputed evidence of the skidmarks of the automobile on its wrong side of the road, the failure of the driver to stop and render assistance, and the lack of an explanation by the driver for traveling on the wrong side of the road, the court below reached its own findings of factual inferences that the driver of the automobile was not guilty of actionable negligence and wantonness, and that petitioner's intestate was guilty of contributory negligence.

The court below thus concluded that there was no evidence of actionable primary negligence which could form a basis for the district judge's finding that respondent was guilty of wantonness (as to which contributory negligence is not a defense under South Carolina law) in leaving the scene without stopping to render aid and assistance. Petitioner filed a petition for rehearing (App. 29) which was denied by the Court below on February 10, 1964 (App. 32).

REASONS FOR GRANTING THE WRIT

1. Existing conflict among the circuits and also among the courts within specific circuits on the issue presented:— The issue in this case relating to the construction of Rule 52 (a) of the Federal Rules of Civil Procedure is whether a district judge's findings of fact, even though not clearly erroneous, are subject to review and may be set aside by a federal appellate court where such findings are based upon conflicting inferences from undisputed evidence. On this

issue it is clear that there is an existing conflict among the circuits, *Landgren v. Freeman* (C. A. 9, 1962), 307 F. (2d) 104. Compare *Orcis v. Higgins* (C. A. 2), 180 F. (2d) 537, and *Pflugradt v. U. S.* (C. A. 7, 1962), 310 F. (2d) 412, holding that a federal appellate court is empowered to set aside findings of fact based upon factual inferences from undisputed evidence without regard to the "clearly erroneous" rule, with *Randall Foundation, Inc., v. Riddell* (C. A. 9, 1957), 244 F. (2d) 803, and *Landgren v. Freeman* (C. A. 9, 1962), 307 F. (2d) 104, holding to the contrary. The existing conflict among the circuits is also pointed out in Volume 2B Barron & Holtzoff, Federal Practice and Procedure, Section 1132, at pages 516, 523-24 and in Volume 49 (April, 1963), Virginia Law Review, page 506, which exhaustively treats the problems of appellate review under Rule 52 (a). There is also a conflict on this issue among the courts within some of the circuits.[1] Those courts holding that a federal appellate court is empowered to review and set aside findings of fact based upon conflicting inferences from undisputed evidence seek to justify their right to review and set aside such findings by labeling and treating them as conclusions or matters of law, *Quikset Locks, Inc., v. Hillaren* (C. A. 9, 1954), 210 F. (2d) 483; or by reasoning that inferences from undisputed evidence involves legal reasoning which frees the reviewing court from the "clearly erroneous" rule under Rule 52 (a), *Hillard v. Commissioner* (C. A. 5, 1960), 281 F. (2d) 279, *Galina Oaks Corp. v. Scofield* (C. A. 5, 1954), 218 F. (2d) 217; or that the appellate court is just as capable as the trial judge to draw inferences from uncontradicted evidence, *E. H. Sheldon & Co. v. Commissioner* (C. A. 6, 1954), 214 F. (2d) 655. On this point, as was so aptly stated by the author of the note on the subject of appellate

[1] See cases collected in volume 49 (April, 1963), Virginia Law Review, page 506, footnote 5.

review of findings of fact based on undisputed evidence in 49 Virginia Law Review (April, 1963), page 527:

> "The terminology of these courts is varied, but they all reach the same result—free review of facts untrammeled by Rule 52 (a)'s mandate."

Also apposite to the question presented herein is the statement of the author at page 527 that:

> "The court's method of circumventing rule 52 (a), which appears quite reasonable at first blush, becomes, on closer investigation, a questionable manipulation of traditional principles to achieve a predetermined objective. * * * Upon close analysis, the rationale of the court's manipulation is indeed difficult to justify, irrespective of the desirability of broader appellate review where the facts are undisputed."

And just as this Court in *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, reasoned and concluded that under the Federal Employer's Liability Act the lower court cannot permit the defense of "assumption of risk" by changing its name to "non-negligence", so likewise in the case at bar, it is respectfully submitted that the court below should not be permitted to set aside "findings of fact" by treating them as "conclusions or matters of law" merely because such findings were based upon inferences from undisputed evidence. The reasoning of this Court in the *Tiller case* applies with equal force in the instant case.

The question presented herein is important because, as stated by Judge Sanborn, speaking for the Eighth Circuit in *Pendergrass v. New York Life Ins. Co.*, 181 F. (2d) 136, 138:

> "The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of

justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

And speaking in the same vein for the Ninth Circuit, Judge Duniway in *Landaren v. Freeman*, 307 F. (2d) 104, 114, 115 said:

"It seems to us that the Clark view is favored by history. Rule 52 (a) incorporates the type of review that previously was had in equity cases. * * * Nothing in the history of review of equity cases or of law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Rule 52 (a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. Rule 52 (a) explicitly clearly applies where the trial court has not had an opportunity to judge of the credibility of witnesses."

The allowance of the petition in this case would afford this Court the opportunity to review the problems involved herein in their entirety and resolve the uncertainty and conflicts which exist, not only among the circuits, but also within the courts of some of the circuits.

2. The decision is not in accord with applicable decisions of this Court:—The decision in the court below is in conflict with the ruling by this Court that findings of fact made by the district judge are binding on an appellate court unless clearly erroneous and that this rule applies also to factual inferences from undisputed evidence.

United States v. United States Gypsum Co., 333 U. S. 364;
Commissioner of Internal Revenue v. Duberstein, 363 U. S. 270.

The only circumstances under which findings of fact, whether based upon disputed evidence or upon inferences from undisputed evidence, may be set aside are where such findings are "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed", *United States v. United States Gypsum Co., supra;* or when not supported by substantial evidence or are clearly against the weight of the evidence or induced by an erroneous view of the law, *Sanders v. Leach* (C. A. 5), 158 F. (2d) 486; *Cedillo v. Standard Oil of Texas* (C. A. 5), 291 F. (2d) 246. None of these circumstances are present in the case at bar. This is clearly manifested when we consider that under South Carolina law questions of negligence and proximate cause when based upon violations of the Uniform Traffic Act of South Carolina which, *inter alia*, provides that a vehicle shall be driven on the right half of the roadway, Section 46-381 of the Code of Laws for South Carolina, 1962, and regulates the speed limits, Section 46-362 of the Code of Laws for South Carolina, 1962, are factual issues for the determination of the fact-finding tribunal, for as stated by the South Carolina Supreme Court in *Eickhoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. (2d) 153, 155:

> "It is unnecessary to cite authority that the violation of a statute is negligence *per se* and whether or not such breach contributed as a proximate cause to plaintiff's injury is ordinarily, and here, a question for the jury."

And that an appellate court will not try facts of cases *de novo* or set aside a finding of fact as clearly erroneous merely because it might give the facts another construction or resolve the ambiguities differently has been firmly established by the decisions of this Court.

United States v. E. I. DuPont de Nemours, 351 U. S. 377;

United States v. Nat'l Assn. of Real Estate Boards, 339 U. S. 485.

Notwithstanding the relatively recent decision of this Court in *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 270, there is still a conflict among the circuits as to whether the "clearly erroneous" rule is applicable to findings of fact based upon inferences from undisputed evidence. The Seventh Circuit in *Pfluerath v. U. S.*, 310 F. (2d) 412, held that this rule does not apply to inferences from undisputed facts. But for a contrary holding see *Lundgren v. Freeman* (C. A. 9, 1962), 307 F. (2d) [illegible].

It is respectfully submitted that the allowance of the petition in the case at bar would afford this Court the opportunity to resolve the prevalent doubts and conflicts among the circuits on an important and far reaching question of appellate review and would be conducive to the fair and efficient administration of justice.

3. The decision of the court below involves an important question of state law affecting the public health, safety and welfare and was decided in a way in conflict with applicable state law:—Reference to the opinion of the court below in footnote 1 clearly indicates that it was undisputed that the automobile which struck petitioner's intestate was traveling off its wrong side of the road. It was also undisputed that intestate's body was badly mangled and crushed, evidencing the excessive speed at which the automobile was traveling, and in addition thereto there was testimonial evidence relating to the excessive speed. And finally, it was also undisputed that after petitioner's intestate was struck, the driver fled the scene without stopping to render aid and assistance; and that upon the identity of the automobile and driver being established by cogent and compelling circum-

stantial evidence, the driver nevertheless failed to offer any explanation at the trial for being on the wrong side of the road.

Notwithstanding the foregoing evidence of record, the court below reversed, setting aside the trial judge's findings of fact that the driver was negligent and wanton, that intestate's death was proximately caused by the negligence and wantonness of the driver, and that intestate was not guilty of contributory negligence. In so setting aside the trial judge's findings and reversing, the court below decided the case in a way in conflict with the decisions of the South Carolina Supreme Court, *Bowers v. Carolina Public Service Company*, 148 S. C. 161, 145 S. E. 790, and *Tinsley v. Parris*, 174 S. C. 417, 178 S. E. 496, the headnote of which pertinently reads as follows:

> "Operation of motor vehicle on left side of highway in violation of statute, where injury results, raises presumption that violation proximately caused the injury."

The decision is also in conflict with a factually analogous case, *Brock v. Carolina Scenic Stages and Carolina Cas. Co. of Burlington*, 219 S. C. 360, 65 S. E. (2d) 468, wherein the South Carolina Supreme Court said:

> "We think the circumstances heretofore set out, when considered together, are sufficient **in the absence of any explanation by the defendants**, to warrant an inference that the collision was caused by the bus being driven to the left of the center of the highway * * *."

The cases of *Smith v. Biggs* (C. A. 4), 223 F. (2d) 839, and *Williams v. Ford*, 233 S. C. 304, 104 S. E. (2d) 378, upon which the court below relied in reversing the judgment of the District Court are clearly distinguishable on the facts from the case at bar and, therefore, not controlling herein. In *Smith v. Biggs*, *supra*, the occurrence took place in defendant's proper lane of travel, whereas in the instant

case the evidence shows that defendant was traveling on his wrong side of the highway when the deceased was struck; and in *Williams v. Ford, supra*, there was an uncontradicted, complete, and adequate explanation offered by the defendant for crossing over to his left or wrong side of the roadway, an explanation totally lacking and absent in the present case.

The decision of the court below, in effect, constitutes judicial sanction for wrongdoer motorists to escape civil liability for fatally striking down pedestrians while driving on the wrong side of the roadway by fleeing the scene in callous disregard of the lives of the victims and offering no explanation for being on the wrong side of the roadway, notwithstanding compelling circumstantial proof disclosing the identity of such "hit and run" motorists.

This case presents an important question which materially affects the public health, safety and welfare of the people of the State of South Carolina. The Court below, in reversing, not only decided this question in a way in conflict with applicable state law, but also has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, for in taking this action, the court below exceeded the power conferred upon it by Rule 52(a), as that power is defined by this Court in *United States v. United States Gypsum Co.*, 330 U. S. 364.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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DISTRICT JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an action under the Lord Campbell's Act to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence and wantonness of the defendant in the operation of his automobile.

In compliance with Rule 52(a), Rules of Civil Procedure, I find the facts specially and state my conclusions of law thereon, in the above cause, as follows:

FINDINGS OF FACT

1. Plaintiff is a citizen of the State of North Carolina, and the defendant is a citizen of South Carolina, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. At about 1:20 a. m. on May 13, 1956, the Sheriff of Sumter County, South Carolina, received a telephone call and in response to the call went about fourteen miles east of Sumter on U. S. Highway 378 and there found plaintiff's intestate L. T. McGee lying on his face, dead, off of the roadway on the left side (going east); there were glass and debris in the center of the highway and glass was strewn up and down the road; there were skid marks in the right-hand portion of the highway (going east), beginning in the right-hand lane, and going across the center line and on off of the highway. The glass picked up at the scene was found to have the following on it: MO MO CO E IN MADE USA 12 VOLT, indicating that the broken headlight had a 12 volt ignition system and was made by Ford Motor Company. 1956 was the first year that Ford Motor Company came out with a 12 volt ignition system and only on Lincolns that year.

3. On the early morning of May 13, 1956, about two miles out of Sumter, a 1956 Lincoln convertible, pink body, black top, top up, back glass down, was parked off of the highway on the right and pulled directly in front of an insurance salesman who lived in Turbeville, South Carolina, and who was traveling toward Turbeville (east) on U. S. Highway 378; the insurance salesman had to apply brakes, to keep from hitting the Lincoln; the insurance salesman

followed along behind the Lincoln for a couple of hundred yards before passing it; after passing it he continued toward Tarboville at a speed of about 65 or 70 miles per hour. The Lincoln had a South Carolina license. The Lincoln was occupied by a white man with a fresh haircut and black hair who was driving, and a blonde-hair woman with a pony-tail hair style.

There was another automobile behind the insurance salesman during the time he was following the Lincoln and after he passed the Lincoln, the Lincoln and the other car traveled together along the highway at approximately the same speed, with the Lincoln in front, staying about a mile behind the insurance salesman. The two cars were traveling at a speed of approximately 60 or 70 miles per hour.

About 13 or 14 miles after passing the Lincoln, the insurance salesman saw a man walking in the direction of Sumter (west) on the right-hand "set-back" about 15 or 20 feet off of the pavement, who was later identified as plaintiff's intestate L. T. McGee, and about two or three hundred yards further down the road he noticed a Ford automobile that had backed off of the paved portion of the highway, the front wheels were in the "set-back" and the back wheels were up on the "wooded part" and almost straight to the road; the headlights were not burning on the car, but the dome light inside the car was burning, the left front door was open; the car looked familiar to the insurance salesman and after traveling another hundred yards or so he decided to turn around and go back to see if he could help the man he had seen walking along the highway.

When the insurance salesman turned around and was proceeding in a westerly direction the headlights of the oncoming vehicles were facing him. When he got within five or six hundred yards of the oncoming cars, he saw the car meeting him zig-zag, or cut back and forth across the highway for a second or two—four or five zig-zags, and then he saw a black shadow between the headlights of the car he was meeting; the car he was meeting cut toward his side of the road over the white line and then straightened up; the car came over far enough in his lane that he applied

his brakes, fearing that he was going to be hit; two cars then passed him and he saw that the first car that passed was the 1956 Lincoln that he had passed when he was traveling east on U. S. Highway 378; and that the left front headlight on it was out; as the lights on the two cars passed, the insurance salesman saw just a few feet in front of him a man lying on his side of the road and he had to apply brakes to keep from running over him. The man's feet were at the edge of the pavement, a foot or so from the shoulder, his head was toward the center line toward Sumter; his back was toward the insurance salesman, lying sideways.

The insurance salesman looked back at the two cars that had passed and they cut their lights off, speeded up and did not stop. This took place between 12:45 and 1:00 o'clock a. m. The insurance salesman observed skid marks in the highway starting off at about the center of the lane of travel going toward Turbeville (east) and ending across the white line.

4. May 13, 1956, was a clear night. The road was an open highway, straight for about six or eight miles at the place of the accident. The speed limit was 55 miles an hour.

5. At around 1:30 o'clock a. m. on May 13, 1956, a Lincoln automobile, pink body, black top convertible, with the top up, with South Carolina license tags, and a Fort Jackson sticker on it, drove into a filling station at Manning, South Carolina, on U. S. Highway 301, north, a distance of about eighteen miles from the scene of the accident; a white man about 5' 9" tall, weighing approximately 180 pounds, and a white woman were in the Lincoln; the filling station operator could not say whether or not the defendant who was sitting in the Court Room during the trial of the case was the driver of the car; the woman went to the rest room and the man got a Coca-Cola; the filling station operator observed that the left front headlight was out and "wrinkles down the side" and the right rear fender was bashed in on the Lincoln automobile, and he remarked to the driver of the Lincoln about it and the driver said that he had done it on a guy wire; the man drank his Coca-Cola and the woman came back from the rest room and they got in the car and left, going back in the same direction from

which they had come; in two to four minutes after the Lincoln left the filling station a Highway Patrolman came into the filling station inquiring about a Lincoln automobile, saying that there had been a "hit and run" accident.

6. Upon information received the Sheriff of Sumter County, South Carolina, on May 27, 1956, went to Pringle Brothers Motors, Inc. in Biloxi, Mississippi, and there found a damaged left front pink fender which had been removed from a 1956 Lincoln belonging to the defendant Edmond V. Cole of Columbia, South Carolina, bearing South Carolina license. The Lincoln automobile had been brought in to Pringle Brothers Motors in Biloxi, Mississippi, on May 16, 1956, with left front fender, left cowl panel and hood panel damaged, the biggest damage being on the fender, however it was not smashed or crumpled and the paint was not damaged on it, but there was a depression on the fender, and upon direction the fender was replaced, and the hood painted.

7. After the left front fender of the Lincoln automobile of the defendant had been replaced in Biloxi, Mississippi, the defendant returned to South Carolina. A Deputy Sheriff for Sumter County, South Carolina, investigating the case went to Nelson Motors in Columbia, South Carolina, where the Lincoln automobile had been taken for repairs of the damage to the rear right of the car which had been done in New York, and when one of the mechanics at Nelson Motors took off the left front headlight rim that holds the light in and behind that in the assembly, there were small slivers of glass, showing that the light had previously been broken and replaced.

8. For the year 1956, through May 15, 1956, there were five Lincoln convertibles registered with the South Carolina State Highway Department, and 1956 South Carolina License G 1970 was issued on April 13, 1956, to Cole Studios, Building 4299, Fort Jackson, South Carolina, for a 1956 Lincoln convertible. Defendant's Lincoln convertible was the only Lincoln convertible registered with the South Carolina Highway Department that had a Fort Jackson sticker or tag on it.

9. The defendant Edmond V. Cole admitted that he owned a 1956 Lincoln convertible, black top with a light purplish (amethyst) body, and that it had a black and white Fort Jackson sticker for commercial vehicles on it, and that on the morning of May 12, 1956, all known damage to the automobile was confined to the right, rear portion of the automobile which had been caused in a collision in New York State, while the automobile was being driven by Stanley Thielman, a friend and former employee who had gone to New York with him the week prior.

10. On Tuesday, May 29, 1956, after the Sheriff of Sumter County, had been to Biloxi, Mississippi, and gotten the damaged fender, he talked with the defendant and the defendant told him that the damage to the right rear side of his 1956 Lincoln was done in New York, a few days prior to May 12, 1956, but that he did not know how the damage was done to the fender on the front left side of his car and the only thing he knew was that he had his car parked at the Columbia Drive In and apparently someone backed into the car there and the defendant said to the Sheriff, "I know what you want me to say but I am not going to say it until I have conferred with my attorney" and he then inquired of the sheriff if his prime interest in the case was to see that the family of the deceased was taken care of. The defendant could not give the Sheriff a minute account of his activities on the night of the accident.

11. The defendant admitted that he and his friend Stanley Thielman left New York, on May 11, 1956, and arrived in Columbia, South Carolina, shortly after midnight on May 12, 1956, and that around eight or nine o'clock the morning of May 12, 1956, he took his Lincoln automobile to Nelson Motors in Columbia, where he had bought it, to get an estimate for repairs of the damage done to his automobile in New York; in order to file claim under his $100 deductible collision insurance policy, and that the repairs to the rear right of his Lincoln were made by Nelson Motors some time around May 28, 1956.

12. Defendant is in the photographic business with studios at Fort Jackson, South Carolina.

13. The defendant admitted that he did not lend his Lincoln convertible or give anybody permission to use it the night of the accident, and that between the hours of 1:00 o'clock p. m. on Saturday, May 12, 1956, and 9:00 o'clock a. m. on Sunday, May 13, 1956, his Lincoln convertible was in his possession.

14. The defendant did not recall what he did on Sunday, May 13, 1956.

15. The defendant admitted that on either Monday, May 14, 1956, or Tuesday, May 15, 1956, he and Stanley Thielman left Columbia, South Carolina, to go to Biloxi, Mississippi, which is about one and one-half days' travel time from Columbia, in his damaged 1956 Lincoln convertible, and that on May 16, 1956, Stanley Thielman took the Lincoln convertible to Pringle Brothers Motors, Inc. in Biloxi, Mississippi, where the left front fender was replaced and that Pringle Brothers Motors, Inc.'s bill was for $122.39 which he paid, but that he did not make claim with the insurance company on his $100 deductible collision insurance policy, and that he and Stanley Thielman returned to Columbia, South Carolina, around May 21 or 22, 1956.

Pringle Brothers Motors' bill was for the following repairs: "Replace, left, front fender; replace front fender mldg.; str. hood panel; fill cowl panel; painting."

16. The driver of the 1956 Lincoln convertible, immediately after the "hit and run" accident told the filling station operator at Manning, South Carolina, that the damage to his Lincoln automobile had been done on a guy wire; the defendant told the Sheriff of Sumter County, South Carolina, when the Sheriff was interviewing him after his return from Biloxi, that the damage to the left front fender of his Lincoln automobile must have been done while he had it parked at the Columbia Drive In, that someone must have backed into it; at the trial of the case the defendant said that the damage to the left front of his Lincoln was done at Fort Jackson, that he found blue paint on the fender and he assumed that a blue truck usually parked in the area where he parked his Lincoln had hit it.

17. The preponderance of the evidence in this case establishes that (1) the automobile which struck and killed plaintiff's intestate was owned by the defendant Edmond V. Cole; (2) the defendant Edmond V. Cole was the driver of the 1956 Lincoln convertible automobile which struck and killed plaintiff's intestate and left the scene without stopping; (3) the negligence and wantonness of the defendant while driving his Lincoln convertible automobile was the proximate cause of plaintiff's intestate's death; (4) plaintiff's intestate was not guilty of negligence, contributory negligence or contributory wantonness.

18. L. T. McGee died intestate, survived by an only child, a married daughter, Theo McGee Tedder, who lived with him, but was supported by her husband. The deceased was sixty-nine years old at the time of his death and was a farmer. As a result of the death of her father, Theo McGee Tedder has suffered actual damages in the sum of Twenty Five Thousand ($25,000.00) Dollars. Plaintiff is, therefore, entitled to have judgment against the defendant Edmond V. Cole in the sum of Twenty Five Thousand ($25,000.00) Dollars, actual damages.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. The defendant was guilty of actionable negligence, wilfulness and wantonness in the operation of his 1956 Lincoln convertible automobile upon the highway of South Carolina, in violation of the laws and statutes of South Carolina, and the negligence, wilfulness and wantonness of the defendant was the direct, proximate and efficient cause of the injuries and death of plaintiff's intestate L. T. McGee.

3. The failure of the defendant to stop and render assistance is evidence of conscious indifference to consequences sufficient to warrant a finding of wantonness on the part of defendant. *Harrison et v. Shuff* (C. A. 2), 305 F. (2d) 333 (1962); *Garippa v. Wisotsky*, 108 N. Y. S. (2d) 67, affirmed, 280 App. Div. 807, 113 N. Y. S. (2d) 722, affirmed 305 N. Y. 551, 111 N. E. (2d) 443.

4. Circumstantial evidence in order to be sufficient to warrant a finding of fact must lead to the conclusions with reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference and not mere speculation. Such facts and circumstances must be reckoned with in the light of ordinary experience and the conclusions deducted therefrom be such as common sense indicates, and not rest upon speculation, surmise, or conjecture.

In my opinion, the evidence in this case meets the requirements of circumstantial evidence and is sufficient to establish that the defendant owned the automobile which struck and killed plaintiff's intestate, that the defendant Edmond V. Cole was the driver of the 1956 Lincoln convertible automobile which struck and killed plaintiff's intestate and left the scene without stopping, that the negligence and wantonness of the defendant while driving his Lincoln convertible automobile was the proximate cause of plaintiff's intestate's death, and that plaintiff's intestate was not guilty of negligence, contributory negligence or contributory wantonness.

5. The beneficiary for whom this action is brought is the married daughter of plaintiff's intestate.

6. Based upon the foregoing Findings of Fact and Conclusions of Law, I am of the opinion that the plaintiff Charles L. Dean, Jr., Administrator of the Estate of L. T. McGee, deceased, should have judgment against the defendant Edmond V. Cole in the Sum of Twenty Five Thousand ($25,000.00) Dollars, actual damages.

Entry of appropriate judgment is directed accordingly, and

IT IS SO ORDERED.

Dated:
Spartanburg, South Carolina,
May 17, 1963.

/s/ C. C. WYCHE,
United States District Judge.

DECISION OF UNITED STATES COURT OF APPEALS

For the Fourth Circuit, Reversing Case

Before Sobeloff, Chief Judge, J. Spencer Bell, Circuit Judge, and Thomsen, District Judge.

Irvine F. Belser, Jr. (Roger M. Heyward and Belser, Belser & Baker on brief) for Appellant, and Henry Hammer (Henry H. Edens on brief) for Appellee.

J. SPENCER BELL, Circuit Judge:

The defendant appeals from a judgment of the district court without jury in a wrongful death action. Shortly after midnight of May 12-13, 1956, plaintiff's decedent, a 69 year old farmer, was run over and killed by a passing motorist in a rural area between Sumter and Turbeville, South Carolina. The two lane road was straight for several miles each way from the place of the accident. The night was clear. There were no intersecting roads. The testimony of the plaintiff's only eyewitness is carefully summarized as follows: The witness left Sumter for Turbeville, traveling in an easterly direction, with his headlights burning. About two miles out of Sumter a 1956 Lincoln convertible pulled sharply in front of him from the south shoulder of the highway, necessitating an application of brakes to avoid a collision. At this time another car was behind the witness' car. The witness followed the Lincoln closely for a couple of hundred yards, then passed it. After he had passed the Lincoln, he observed through his rear view mirror that the car following him stayed behind the Lincoln. The witness accelerated to between 60 and 70 miles an hour, traveling a distance of 13 or 14 miles, while he observed the headlights of these cars in his rear view mirror. He noticed that both of these cars remained in their relative positions approximately a mile to his rear. While these conditions maintained with respect to the relative positions and speeds of the three cars, the witness observed a man walking west toward Sumter on the south shoulder of the highway. Two or three hundred yards farther east he

observed on his right an automobile parked off the road almost at right angles thereto, with its left front door open and dome light burning. He then traveled a hundred yards or so farther to a driveway, where he turned around, having decided to offer help to the pedestrian. As the witness traveled back in a westerly direction, when he was 500 or 600 yards away from the place of the accident he observed the oncoming headlights of a car suddenly zigzag or weave for a second or two. Almost at the same instant he saw a shadow pass in front of the car lights. It appeared to the witness that the oncoming car cut slightly across the center line, then straightened up and continued towards him in its proper or eastbound lane.[1] As the first car passed him he noticed that its left front headlight had gone out. When the two cars had passed him, he observed the deceased lying in the westbound lane only a few feet in front of his car. He stopped, opened his door, looked back, but observed no lights on either of the cars which had passed, concluding that both cars had cut off all their lights and sped up as they left the scene. The witness was at the least from 200 to 300 yards away at the moment of impact. He could not see whether the deceased was "thrown" any distance or not. Upon this evidence, the district court found the driver of the car described by the witness guilty of wilful and wanton negligence which was the proximate cause of the death of plaintiff's intestate. The court also found upon this evidence that the deceased was not guilty of contributory negligence.

The defendant strenuously insists that there is not substantial evidence in the record to support the court's finding that the defendant was the driver of the hit and run car in spite of the considerable amount of circumstantial evidence in the case tending to show that he was the owner of the car in question. We do not reach this question, as we find that the evidence will not support the court's findings with regard to primary and contributory negligence.

---

1 Skid marks on the highway at the site tended to confirm this, as they commenced in the eastbound lane, then crossed over just past the center line into the westbound lane at or near the location of the body.

For convenience, we shall assume *arguendo* that the defendant was proven to be the driver of the car which struck and killed the deceased. The scene of the accident was on a straight, dry, level, open highway in good weather. The only specific act of negligence at or prior to the time of the accident with which the defendant is charged was speeding in excess of the posted limit, and that charge was based upon the testimony of the witness that he himself was driving between 60 and 70 miles per hour and that the defendant's car was keeping up with him "about a mile" to his rear. The posted speed limit was 55 mph. Even conceding the witness' remarkable powers of vision and depth perception—the facts to which he testified do not support his opinion. If traveling for 12 miles at an average of 65 mph he had gained a mile on the defendant's car when he passed the pedestrian—then traveled an additional ¾ mile[1]—turned around and recovered all but 400 or 500 yards of this distance before the following car began to zigzag as it approached the pedestrian—the mathematical probabilities do not sustain the proposition that defendant's car was traveling in excess of 55 mph. But we do not rest our opinion on mathematical computation, because too many unknown factors existed—we simply say that the evidence does not supply sufficient facts to justify the court in accepting the witness' estimate of speed on this critical issue. Even, however, if we concede this point there is still a fatal weakness in the plaintiff's proof. Unless we know at what distance the deceased entered the highway ahead of the oncoming car, we cannot find that the speed of the car was the proximate or efficient cause of his death. Section 26-7 of the Code of Laws of South Carolina (1952) provides that:

> "The provisions of chapter 7 of Title 46 declaring *prima facie* speed limitations shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of the accident."

[1] Evidence of later measurements showed it to be ¾ of a mile from the location of the body to where the witness turned around.

We may not infer that the speed of the automobile was the proximate cause of the accident unless we have some factual basis to support the inference. Similarly there is no basis for an inference of negligence in the evidence that the car "zigzagged" into the west bound lane for a second or two before, or at the instant of, the impact in the absence of any evidence as to when or at what distance the deceased entered the road in front of the oncoming car.

The plaintiff's own evidence in this case shows his deceased to have been guilty of contributory negligence as a matter of law. That evidence shows that the deceased was walking 15 or 20 feet off the road on the south shoulder of the eastbound lane of the highway. Both the testimony of the eyewitness and the physical facts indicate that the deceased was struck a few seconds later at or near the center line of the highway. The facts make it clear that the deceased got into the highway at a time when vehicles were approaching from both directions, their headlights clearly visible, and traveling at considerable speed. There was no obstruction to interfere with or obscure his vision. There was no intersecting road or driveway—simply wide open country. The law of South Carolina gave the right of way to the vehicular traffic—not the pedestrian. CODE OF LAWS OF SOUTH CAROLINA (1952), §46-435. To cross the highway under such circumstances was negligence as a matter of law. Even if the defendant were guilty of negligence, this contributory negligence of the deceased must bar plaintiff's recovery.

In *Smith v. Biggs*, 223 F. (2d) 839 (4 Cir.), *cert. denied*, 351 U. S. 912 (1955), a diversity case, arising under the laws of South Carolina, strikingly similar on the facts to this case, the court said:

> "Obviously, Lee Biggs, whether crossing the road or walking along the road, owed a duty to look. If he failed to look, he was clearly guilty of contributory negligence. If he looked he could not have failed to see the lights of Smith's approaching car. * * *. And, of course, if Lee Biggs saw the rapidly approaching car, yet walked out on the road right into the car, his conduct was even more reckless, with an utter dis-

regard for his own safety: * * * 'He either did not look to the east, or, if he looked, he did so in such a careless and negligent manner that he failed to see what was obvious. In either event he was guilty of negligence as a matter of law.'" 223 F. (2d) at 841.

The *Smith* case cites numerous decisions of this court in support of its position. This is also the law of South Carolina. *Carwe v. Shindler*, 228 S. C. 550, 91 S. E. (2d) 254 (1956), citing and approving the *Smith* decision. See also *Williams v. Ford*, 233 S. C. 304, 104 S. E. (2d) 378 (1958).

The plaintiff argues that the driver's subsequent failure to stop and render assistance was evidence of wilful and wanton negligence which would overcome deceased's contributory negligence. Where primary negligence does exist, subsequent conduct of the actor may be considered by the fact finding tribunal in determining the degree of primary negligence. Leaving the scene of an accident may strongly indicate that the responsible party was not only negligent, but exhibited a callous disregard for the safety of others. But in the present case, there being no substantial evidence of prior negligence to support the court's finding, defendant's subsequent act of departing the scene without rendering assistance cannot relate back and transform non-negligent conduct into wilful and wanton conduct as a matter of law. *Cf. Hallman v. Cushman*, 196 S. C. 402, 13 S. E. (2d) 498 (1941).

There being no substantial evidence to support the court's findings on negligence and contributory negligence, the judgment is *Reversed.*

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of January 7, 1964, reversing the judgment of the District Court, upon the following grounds:

1. This Court, in reaching its conclusion that there was no substantial evidence of primary negligence on the part of the driver of the automobile to warrant the fact-finding tribunal to consider the subsequent conduct of the driver in

leaving the scene without stopping and rendering assistance as evidence of wantonness, as to which contributory negligence is not a defense under South Carolina law, apparently overlooked the incongruity of its conclusion with its conclusion that the automobile was operated on its left or wrong side of the highway as crucially noted by this Court in footnote 4 of the opinion that:

> "Skid marks on the highway at the site tended to confirm this, as they commenced in the eastbound lane, then crossed over just past the center line into the westbound lane at or near the location of the body.",

under which circumstances the decision of this Court is in direct conflict with the decisions of the South Carolina Supreme Court in *Bowers v. Carolina Public Service Co.*, 148 S. C. 161, 145 S. E. 790, and *Tinsley v. Parris*, 174 S. C. 417, 178 S. E. 496, holding, as enunciated in the headnote of *Tinsley v. Parris*, at 178 S. E. 496, that:

> "Operation of motor vehicle on left side of highway in violation of statute, where injury results, raises presumption that violation proximately caused the injury."

and in view of which the action of this Court, sitting as an appellate tribunal, constitutes an invasion of the province of the fact-finding tribunal.

2. This Court, in reaching its conclusion that plaintiff did not sustain his burden of proof that the speed of the automobile was a proximate cause of the occurrence resulting in decedent's death, seemingly overlooked the significance of the evidence that deceased's body was badly crushed and mangled because of the excessive speed at which the vehicle was traveling when it struck the deceased, that the body was found lying on the vehicle's left or wrong side of the road, that tire marks from the vehicle crossed over the center line into its wrong lane to the point where deceased's body was lying, and that no explanation was offered by the driver for being on the wrong side of the road in violation of the South Carolina Code; all of which circumstances are sufficient to warrant the conclusion that the plaintiff sustained his burden of proof in accordance

with the decision of the South Carolina Supreme Court in a strikingly factually similar case, *Brock v. Carolina Scenic Stages and Carolina Cas. Co. of Burlington*, 219 S. C. 360, 65 S. E. (2d) 468, wherein the Court stated:

> "We think the circumstances heretofore set out, when considered together, are sufficient, in the absence of any explanation by the defendants, to warrant an inference that the collision was caused by the bus being driven to the left of the center of the highway. * * *"

3. This Court, in relying on the decisions of *Smith v. Biggs*, 223 F. (2d) 839 (C. A. 4) and *Williams v. Ford*, 233 S. C. 304, 104 S.E. (2d) 378, apparently overlooked that the facts in each of the cited cases were clearly distinguishable from those in the case at bar and, therefore, not controlling herein. In *Smith v. Biggs, supra*, the occurrence took place in defendant's proper lane of travel, whereas in the instant case the evidence shows that defendant was traveling on his wrong side of the highway when the deceased was struck; and in *Williams v. Ford, supra*, there was an uncontradicted, complete, and adequate explanation offered by the defendant for crossing over to his left or wrong side of the roadway, an explanation totally lacking and absent in the present case.

CONCLUSION

With all due deference to this Honorable Court and its proclivity to do substantial justice, and fully recognizing the rarity with which this Court grants petitions for rehearing, it is earnestly and respectfully submitted that a searching and reflective analysis of the entire evidence, particularly including the facts hereinabove called to the attention of the Court, will make it clear that in accordance with principles of appellate review the judgment of the District Court should be affirmed. To hold otherwise would encourage and constitute judicial sanction for wrongdoer motorists, who strike down and kill pedestrians while driving on the wrong side of the highway in violation of statute, to escape civil liability by fleeing the scene without stopping to render aid and assistance to dying victims whose lives

might otherwise be saved and offer no explanation for driving on the wrong side of the highway, notwithstanding that the identities of such motorists may be subsequently established by circumstantial evidence.

This case presents an important question which materially affects the public health, safety and welfare of the nation, particularly when we consider that more deaths are caused from traffic fatalities in the United States than from any other cause. It is, therefore, respectfully urged that in the interest of the public health, safety and welfare of the nation, this Court should reconsider its decision, which by absolving the defendant from civil liability gives judicial sanction to wrongdoer motorists to flee the scene of a fatality and callously disregard the lives and safety of others.

For the foregoing reasons set forth above and in the brief filed by appellees, it is respectfully urged that a rehearing be granted and that upon such rehearing the judgment of the District Court be affirmed.

Respectfully submitted,

HENRY H. EDENS,
HENRY HAMMER,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition for Rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
HENRY HAMMER,
Attorneys for Petitioner.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition for rehearing filed by the appellee, Charlie L. Dean, Jr., Administrator of the Estate of L. T. McGee, the Court is of the opinion that no cause is shown for a rehearing, and accordingly it is

ORDERED that the said petition be, and it is hereby, denied.

Filed Feb. 11, 1964

MAURICE S. DEAN
Clerk

SIMON E. SOBELOFF,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

ROSZEL C. THOMSEN,
United States District Judge.

A true copy, Teste:

MAURICE S. DEAN, Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

By MARGARET L. DAVIS,
Deputy Clerk.

February 10, 1964.

Office Supreme Court, U.S.
FILED
APR 4 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1963

NO. 896

CHARLIE L. DEAN, JR., Administrator of the Estate of L. T. McGee, Petitioner,

versus

EDMUND V. COLE, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1963

NO. 896

CHARLIE L. DEAN, JR., Administrator of the Estate of L. T. McGee, Petitioner,

versus

EDMUND V. COLE, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

We respectfully submit that the question stated by the petitioner at page 2 of his Petition as the question presented herein is *not* raised by the Circuit Court of Appeal's review and reversal of the District Court's decision in this case.

The only questions involved in this case at any stage of the proceedings have been the same, i.e.:

1. Was the automobile which struck the petitioner's decedent owned or operated by the respondent?

2. Was the driver of the automobile which struck the petitioner's decedent guilty of negligence or wilfulness which proximately caused the accident and the death of petitioner's decedent?

3. Was not the petitioner's decedent guilty of negligence or wilfulness proximately causing his own death and barring recovery therefor?.

These are all evidentiary questions of no "special or important" interest or concern to this Court.

STATUTES AND RULES INVOLVED

In addition to the statutes set forth in the Petition of the petitioner herein, which may or may not be applicable to this case, the following statutes are applicable herein:

Code of Laws of South Carolina, 1962.

"§ 26-7. *Proof of negligence by plaintiff in motor vehicle cases.*—The provisions of chapter 7 of Title 46 declaring prima facie speed limitations shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of the accident."

"§ 46-435. *Crossing at other than crosswalks.*—Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right of way to all vehicles upon the roadway. Between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."

§ 46-436. *Pedestrians on roadways.*—Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. Where sidewalks are not provided, any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its

shoulder, facing traffic which may approach from the opposite direction."

STATEMENT OF THE CASE

The petitioner's decedent was struck and killed by an automobile driven by an unidentified motorist while the decedent was crossing an open, rural highway in the middle of the night of May 12-13, 1956, almost eight years ago.

Approximately a year later, in June, 1957, the decedent's married daughter, as administratrix of his estate and as his sole beneficiary, brought a wrongful death action in a South Carolina state court alleging under oath that the decedent was struck and killed by an automobile driven by a person other than the respondent in the present case. The evidence apparently being insufficient to establish the identity of the driver, however, the decedent's daughter abandoned the action a year later and took a voluntary non-suit in September, 1958.

There the matter rested for some three additional years. On January 27, 1961, however, almost five years after the events in question, the decedent's daughter again brought an action — the present case — for the alleged wrongful death of her father, this time using a different set of attorneys and a different, out-of-state, administrator as plaintiff (apparently selected for the purpose of creating the necessary diversity of citizenship for Federal jurisdiction). Although no additional evidence on the questions concerned had been discovered in the meantime, she also picked out a different defendant to sue, and a different theory of action.

The case was tried November 7-9, 1962, six and a half years after the incident concerned. The petitioner's entire evidence consisted of a rehash of what little evidence the Sheriff of the county concerned had been able to obtain during his investigation of the matter six and a half years before—although the Sheriff had concluded that the evidence pointed to a person other than the respondent as the

probable driver of the automobile in question but did not sufficiently identify the driver to make action against anyone justifiable. The memory of the petitioner's witnesses had, perhaps understandably, become clouded by the lapse of time, and whenever they attempted to deviate, whether inadvertently or otherwise, from the substance of their statements to the Sheriff as recorded in the Sheriff's report six and a half years before, they were forced on cross-examination to retreat to what they had told the Sheriff years before.

The little evidence adduced by the petitioner indicated that sometime between 12:45 and 1:00 A.M., during the night of May 12-13, 1956, at just about the time the respondent was going home to bed in Columbia, 60 miles away, the decedent, a 69-year old farmer who lived in that vicinity, was observed by a passing motorist walking west along the south shoulder of U. S. Highway 378 near the Sumter County-Clarendon County line in a rural area between Sumter and Turbeville, South Carolina, some sixty miles east of Columbia. His automobile was backed partly into the woods bordering the highway, two or three hundred yards to the east, more or less, at right angles to the highway. The headlights were off but the left front door was open and the dome-light was on. The two-lane asphalt highway was straight and level. The weather was clear and dry. No evidence was offered by the petitioner as to what the decedent was doing there at that time of night.

The motorist (the petitioner's witness Roberson), an insurance salesman returning from a date with his girl-friend, drove on east approximately three-quarters of a mile, turned around just beyond the County line, and drove back toward where he had seen the decedent. When he was within some five or six hundred yards of where he had seen the man, he saw a black "shadow" pass momentarily across the headlights of the first of two on-coming cars (traveling east). The car momentarily veered from its lane across the center line and over into his lane, then straightened out

and continued on in its own lane. As the car passed him, the salesman thought he recognized it as being the same pink 1956 Lincoln he had passed a few minutes before 12 or 13 miles back down the highway, two or three miles out of Sumter.

When he reached the spot where he had seen the shadow pass in front of the headlights of the other car, he found the decedent's body lying in the roadway, on his (the salesman's) side of the center line, i.e., in the north (or westbound) lane, and across the center line for traffic moving east (as the other car had been).

Both the motorist and the Sheriff testified that the skid marks found at the scene and presumably left by the automobile which struck the decedent started in the right lane (as viewed from that driver's viewpoint) at the point where the zigzagging started (R. 23-24, 51), i.e., that the driver was in his proper lane when he first saw the decedent in the roadway ahead of him and tried to avoid him by turning (or skidding) in the direction apparently offering the best hope of averting a collision.

About half an hour later, at about 1:30 A.M., May 13, 1956, a 1956 Lincoln was observed at a service station in Manning, South Carolina, on U. S. Highway 301, some 18-20 miles southeast of the spot where the decedent was run over. The body of the car was of a pinkish color; the witnesses disagreed as to the color of the top. The driver got out, bought a "coke" and a package of "nabs," and waited while his female companion went to the rest room. When she returned, the man and woman got back into the car and drove off at a leisurely pace in the direction from which they had come. The witnesses disagreed as to the length of time the car was at the service station (somewhere between eight and thirty minutes). While it was there, a service station attendant (petitioner's witness Harrington) observed some minor damage to the right rear side. He told the Sheriff during the investigation shortly afterward that the *right* front headlight was also out (De-

fendant's Exhibit A, R. 253). During the trial six and a half years later he tried to testify that the *left* front headlight was out but finally backed down and admitted that what the Sheriff had recorded him as saying during the investigation was more likely to be right than his recollection at the trial six and a half years later and that he would stand by what the Sheriff said he said (R. 23, 40). He also testified that the car had South Carolina license tags and a Fort Jackson sticker on the bumper.

The only evidence offered by the petitioner in support of his allegations of negligence and wilfulness was the testimony of the witness Roberson that *he* was driving "between 60 and 70" (R. 45) on his way home from a date and saw the headlights of the Lincoln which he had passed (and of another car which he also passed). Following along at a more or less uniform distance behind him, "a mile to a mile and a half" back (R. 57), and that after he had turned around and was coming back to where he had seen a man walking on the shoulder of the highway, he saw the headlights of an oncoming car momentarily veer from its lane across the center line, a second or two before he saw a "black shadow" in front of the headlights, and then straighten out and continue on in its own lane.

The only evidence offered by the petitioner in support of his allegation that the respondent owned the automobile which struck the petitioner's decedent was the testimony of the motorist and the service station attendant referred to above as to an automobile seen momentarily by the motorist some 12-14 miles before reaching the scene in question and a similar automobile seen by the service station attendant on a different highway 18-20 miles away half an hour later, the undenied fact that the respondent owned an automobile answering that general description, and testimony that some minor damage to the left front fender of the respondent's automobile (*not* the parts projecting furthest to the front) had been repaired, at a cost of only $122.39, by a former business associate of the respondent in Biloxi, Mississippi, several days later.

No evidence at all was offered by the petitioner in support of his allegation that the respondent was the driver of the automobile which struck the decedent. He sought to *infer* from the evidence summarized above that the automobile which struck the decedent belonged to the decedent, and then to go on from this and make the further inference that therefore the respondent must have been driving it at the time and place in question.

The conclusion which the petitioner sought to draw in this respect (an inference mounted on an inference) was refuted by direct evidence to the contrary, from both the petitioner's witnesses and the respondent's witnesses. The descriptions given by the petitioner's witnesses of the driver of the automobile (or automobiles) they had seen did not fit the respondent's unquestionable age and physical characteristics. They could not identify the respondent during the investigation immediately after the incident or at the trial six and a half years later. The Sheriff, who unquestionably had a closer view and a better knowledge of the case than anyone else then or now, testified that he "always figured it was" someone else—and obviously therefore could not have been the respondent. An unusually well-trained and experienced officer of the State Law Enforcement Division testified that after investigating the case he had concluded that the respondent was not the driver of the automobile which struck the decedent and that he could not connect the respondent with the case. Two disinterested witnesses testified that they saw the respondent talking business over a cup of coffee in a restaurant in Columbia, some 60 miles away, at the time the decedent was apparently struck and killed.

The respondent, a substantial business man who owns and operates a photographic studio at Fort Jackson, an Army base near Columbia, South Carolina, as well as other businesses elsewhere, voluntarily took the stand and testified as to what little he knew of the matter. He explained in detail his activities and whereabouts at the time in ques-

tion, and during the previous several days and the following several days. He flatly denied that it was his automobile which had struck the decedent and that he had been at the scene in question or at any of the spots where the petitioner's witnesses had allegedly seen an automobile (or automobiles) similar to the one he owned.

His testimony in this regard was corroborated by the testimony of two disinterested witnesses.

He gave an entirely reasonable and logical explanation as to the manner in which the damage to his automobile repaired in Mississippi had occurred, and as to why it had been repaired in Mississippi rather than in South Carolina, New York, or other places where he had business interests.

The significance of the testimony of the petitioner's witnesses as to the make and model of the automobile (or automobiles) which they had seen and as to the alleged presence of South Carolina license plates and a Fort Jackson identification sticker on the automobile (or automobiles) and the undoubted fact that the respondent had an automobile of that make and model with such plates and sticker was reduced to virtual irrelevance by the respondent's proof that there were 240 automobiles of that make and model registered in South Carolina and 488 in North Carolina at the time concerned, that in 1956 South Carolina license plates were virtually identical to North Carolina license plates—same size and shape, same color background, same color letters, same size letters, same arrangement and spacing—the only difference being the two letters different in "North" and "South"; and that the similarity caused difficulties in law enforcement that year and will not be allowed to happen again.

On the basis of the above evidence the trial judge concluded that the automobile which had struck the decedent was owned by the respondent, and returned a verdict for the petitioner. In doing so he ignored the lack of substantial evidence as to (1) the identity of the driver of the auto-

mobile which struck the decedent, (2) negligence or wilfulness on the part of the driver as (3) the proximate cause of the decedent's death, and the overwhelming evidence (4) that the decedent was guilty of negligence and wilfulness which was solely responsible for his death, and disregarded clearly applicable decisions by the South Carolina Supreme Court, the Fourth Circuit Court of Appeals, and this Honorable Court.

The Fourth Circuit Court of Appeals, clearly acting within the scope of appellate review specified by Rule 52(a) of the Federal Rules of Civil Procedure and the numerous decisions of this and other courts defining its meaning, readily noted (and pointed out in its opinion) the lack of substantial evidence of negligence or wilfulness on the part of the driver as the proximate cause of the decedent's death and the clear evidence that as a matter of law the decedent's own negligence and wilfulness was the cause of his death, and reversed the decision of the trial court. It did not find it necessary to decide who owned or was operating the automobile which struck the decedent at the time and place in question, as it had found that "the evidence will not support the (trial) court's findings with regard to primary and contributory negligence."

The decision of the Court of Appeals was unanimous.

The petitioner petitioned the Court of Appeals for a rehearing on substantially the same grounds presented in his Petition to this Court. The Court of Appeals, again in a unanimous opinion, held that no cause had been shown for a rehearing and consequently denied a rehearing.

ARGUMENT

I. INTRODUCTION AND SUMMARY.

Perhaps understandably, the petitioner has artfully couched his Petition in the language of Rule 19 of the Rules of this Honorable Court, in the obvious hope of thereby persuading this Court that it should exercise its discretion and grant a review of the decision of the Court of Appeals

On analysis, however, the arguments advanced by the petitioner are without merit.

We respectfully submit that there are no "special and important" reasons in this case for granting a review on writ of certiorari. There is a complete want of any substantial federal question, indeed of any federal question. There is no conflict between the decision of the Circuit Court and any decision of another court of appeals on the same matter. No important state question is involved. The decision of the Circuit Court is not in conflict with applicable state law. No departure from the accepted and usual course of judicial proceedings is involved.

The numerous cases cited by the petitioner clearly either have no application to the present case or do not support the positions of the petitioner. The case at bar arose in South Carolina and was decided in accordance with the law of South Carolina, and within the scope of appellate review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure and the numerous decisions of this Court and of the Courts of Appeal, including that of the Fourth Circuit.

The case at bar is nothing more or less than a traffic accident case involving one of the thousands of regrettable traffic accidents which occur in our country every year. A correct decision turns upon the circumstances of this particular case, not upon any question of general or special importance. The Supreme Court of the United States should not be called upon to decide such cases.

Although we do not consider that the petitioner's arguments contain sufficient merit to justify extended discussion, we shall consider them in turn hereinbelow, for the convenience and assistance of this Court. Since this is a respondent's brief, and for the sake of simplicity, it will be arranged to correspond to the arrangement of the petitioner's Petition herein.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS OR AMONG THE COURTS ON THE ISSUES INVOLVED IN THIS CASE (Petitioner's Section 1).

The issue stated by the petitioner is a false issue as applied to the case at bar. The petitioner's entire argument rests upon his assertion that the Court of Appeals failed to limit its review to the requirements of Rule 52(a) which permits findings of fact to be set aside only if "clearly erroneous." The petitioner seeks to pose the issue "whether a district judge's findings of fact, *even though not clearly erroneous*, are subject to review and may be set aside by a federal appellate court where such findings are based upon conflicting inferences from undisputed evidence" (Petition, page 6). He then proceeds to try to demonstrate that there is an existing conflict among the circuits and within specific circuits upon that issue, pointing to various decisions which hold that a federal appellate court is empowered to set aside findings of fact based upon factual inferences from undisputed evidence without regard to the "clearly erroneous" rule and to other decisions holding to the contrary. The petitioner cites a number of cases and authorities discussing and illustrating the various theories and justifications adopted by some courts to permit a broader review in the case of findings of fact based on undisputed evidence.

It is not necessary for this Court to take on the considerable task proposed by the petitioner of determining whether or not there is in fact any conflict among the circuits or among the courts within some of the circuits to reach a correct decision in the present case. The issue here is much simpler.

Even if the supposed departure of some of the Circuit Courts from the "clearly erroneous" rule in the area of undisputed evidence might pose an interesting and intellectually stimulating problem, it is a purely academic problem in the present case for the reason that the *Fourth Circuit Court of Appeals in its opinion here concerned clearly*

applied the "clearly erroneous" requirement of Rule 52(a) in its strictest and uniformly recognized sense.

A simple examination of the Circuit Court's opinion discloses that the Court's review of the District Court's findings of negligence, proximate cause and lack of contributory negligence, and of the evidence upon which those findings were based, is completely in accord with the recognized test of "clearly erroneous." Although the petitioner boldly states that the Circuit Court predicated its decision on its own independent findings of fact, suggesting in effect a trial *de novo*, the Circuit Court in fact stated as the basis of its decision reversing the judgment that there was no substantial evidence to support the District Court's findings on negligence and contributory negligence. See for example the final, concluding paragraph of the Circuit Court's opinion (Appendix, Petitioner's Petition, page 29): "There being no substantial evidence to support the court's findings on negligence or contributory negligence, the judgment is Reversed." That statement is supported by other similar references throughout the opinion and by the Circuit Court's close analysis and discussion of the evidence, pointing out a specific and fatal failure of proof on each charge of negligence and further pointing to the clear evidence of contributory negligence which required, under previous decisions of the Circuit Court and of the South Carolina Supreme Court, a finding of contributory negligence as a matter of law.

The Circuit Court's review of the evidence for substance is clearly within the scope of review permitted by Rule 52(a). As stated in Vol. 2B *Federal Practice and Procedure*, Barron & Holtzoff, Section 1135:

> "Rule 52 plainly contemplates a review by the appellate court of the question whether there is substantial evidence to sustain the trial court's findings of fact. Substantial evidence is not merely some evidence. It must be more than a mere scintilla. It is evidence of such quality and weight as would justify a reasonable

per on in drawing the inference of fact made by the c t."

In order to determine whether or not a trial court's findings are "clearly erroneous" under Rule 52(a), a Circuit Court obviously must review the evidence. There is no other way a Circuit Court can determine whether the findings are clearly erroneous or not.

Decisions can be cited from every circuit which accept review by the Circuit Court of the question of whether there is substantial evidence to support the findings of fact as being within the scope of review permitted under Rule 52(a). See e.g. *Evans v. United States*, 319 F. 2d 751 (1st Cir. 1963); *Hyman v. Av. Winarick, Inc.*, 325 F. 2d 584 (2d Cir. 1963); *Allyn v. Abad*, 167 F. 2d 901 (3rd Cir. 1948); *Darter v. Greenville Community Hotel Corporation*, 301 F. 2d 70 (4th Cir. 1962); *Kwong v. Occidental Life Insurance Company of California*, 273 F. 2d 691 (5th Cir. 1960); *Wickman v. Vinco Corp.*, 288 F. 2d 310 (6th Cir. 1961); *Zeddis v. Commissioner of Internal Revenue*, 264 F. 2d 120 (7th Cir. 1959); *Tyson v. State of Iowa*, 283 F. 2d 802 (8th Cir. 1960); *Pacific Queen Fisheries v. Symes*, 307 F. 2d 700 (9th Cir. 1962); *Denver United States Nat. Bank v. Asbell Brothers Construction*, 294 F. 2d 289 (10th Cir. 1961); *Coleman v. United States*, 176 F. 2d 469 (D. C. Cir. 1949).

The petitioner is in fact forced to admit that findings of fact, whether based upon disputed evidence or upon inferences from undisputed evidence, may be set aside within the clearly erroneous rule when "*although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed" (a test consistently stated and applied by the Supreme Court and the Circuit Courts): *United States v. United States Gypsum Company*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948); *United States v. Oregon State Medical Society*, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); *McAllister v. United States*, 348 U. S.

19, 75 S. Ct. 6, 99 L. Ed. 20 (1954); *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960); and cases collected in Vol. 2B *Federal Practice and Procedure*, Barron & Holtzoff, Sec. 1133); "or *when not supported by substantial evidence* or are clearly against the weight of the evidence or induced by an erroneous view of the law." See page 10 of Petition.

This concession by the petitioner is a sufficient answer to this entire case and justifies a denial of the writ of certiorari sought by the petitioner. *It is apparent that the Circuit Court's approach to and review of the evidence here, its finding of a lack of substantial evidence to support the trial court's findings of negligence and proximate cause, and its decision that upon the entire evidence a finding of contributory negligence was required as a matter of law are clear applications by the Circuit Court of the above-stated tests of "clearly erroneous," within even the strictest rule as to the proper scope of appellate review.*

These are the principles consistently stated and followed by the Fourth Circuit Court of Appeals as to the proper scope of appellate review: See *Darter v. Greenville Community Hotel Corp.*, 301 F. 2d 70, 72 (1962), and the authorities therein cited.

We are unable to find any indication in the Circuit Court's opinion that the Court reviewed the trial court's findings in a manner which would disregard the requirements of the "clearly erroneous" rule or liberalize it in any manner. The Circuit Court certainly did not state that it was proceeding to review the evidence *de novo* or that it gave any less weight to the District Court's findings because based in part upon undisputed facts. Significantly, all the decisions cited by the petitioner in support of the asserted conflict in the permitted scope of review specifically state the degree of application which they give to the "clearly erroneous" rule or announce a departure from the rule in the particular instance concerned. In the absence of a statement by the Court of a departure from the "clear-

ly erroneous" test of a liberalization of the scope of review because of the nature of the evidence, we do not see how the Court can be assumed to have made such a departure or liberalization, particularly when the Court in express terms applied tests which are uniformly applied as being within the meaning of "clearly erroneous."

The petitioner's suggestions that the Circuit Court's approach to the findings of the District Court was that of making its own independent findings of fact based upon conflicting inferences from undisputed evidence and that the Circuit Court treated the District Court's findings of fact as conclusions of law are totally unsupported by anything in the Circuit Court's opinion. The Circuit Court cannot be said to have chosen between conflicting inferences. The Circuit Court, reviewing the evidence for instance, found that there could in fact be *no* conflicting inferences—i.e., *that the inferences adopted by the District Court, and naturally the conclusions based upon those inferences, were not supported by substantial evidence.*

It should also be noted that the Circuit Court's analysis of the evidence pointing to contributory negligence and its decision upon that issue parallels exactly its previous decision in *Smith v. Biggs*, 223 F. 2d 839 (4th Cir. 1955), in which certiorari was denied by this Honorable Court (350 U. S. 912, 76 S. Ct. 701, 100 L. Ed. 1446).

In *Smith v. Biggs*, *supra*, which was also a diversity wrongful death action resulting from the decedent's being struck by an oncoming automobile while the decedent was walking upon, or attempting to cross, an open highway during the nighttime, the Fourth Circuit Court of Appeals held that the decedent was contributorily negligent as a matter of law and reversed a judgment in favor of the plaintiff by the same trial judge concerned here. In that case, as in the present case, there were no witnesses to the accident, but the Circuit Court of Appeals held that a finding of contributory negligence was required as a matter of law in view of the clear facts with respect to the conduct of the

decedent. The facts upon which the Court relied for its finding of contributory negligence are virtually identical to the facts shown by the undisputed evidence in the present case. The petitioner's assertions to the contrary in his Petition here are simply not so. Although the Court of Appeals in that case did not specifically discuss the "clearly erroneous" rule in those words, the decision is clearly in accordance with the requirements of that rule, and this Court was squarely presented with that issue by the Petition filed by the plaintiff with this Court for a writ of certiorari.

In his Petition for a writ of certiorari in *Smith v. Biggs* the petitioner therein alleged that the opinion was in conflict with decisions of this Court and of other circuit courts, specifically pointing to the rule that facts and inferences drawn therefrom determined by the trial court are binding in the absence of a "clearly erroneous" finding.

An examination of the Petition for a writ of certiorari in *Smith v. Biggs* (entitled *Biggs v. Smith*, Misc. No. 460, October Term 1955, in this Court) in fact discloses numerous similarities with the Petition in the present case in the arguments and grounds presented. The petitioner there posed numerous conflicts among the circuits which, in the final analysis, were based upon the petitioner's attributing to the Circuit Court of Appeals an incorrect or inadequate treatment of the evidence and which ultimately required a review of the evidence and of questions of fact. It was asserted further that the Court of Appeals had departed from the accepted and usual course of judicial proceedings by drawing unwarranted inferences from the proof and changing questions of fact to questions of law. The petitioner there also asserted that the decision of the Court of Appeals conflicted with previous decisions of the South Carolina Supreme Court and reviewed the South Carolina decisions at length in an effort to support that assertion.

Despite these assertions, this Court, quite properly, denied certiorari.

We submit that the holding of the Fourth Circuit Court of Appeals in Smith v. Biggs with respect to the issue of contributory negligence, and this Court's denial of a writ of certiorari for review of that decision, are sufficient in themselves to support the decision of that Court in the present case. We respectfully submit that the petitioner herein is merely seeking the same ultimate review in the present case that was denied by the Supreme Court in Smith v. Biggs and that the writ sought herein should also be denied, for the same reasons.

The Circuit Court, in the present case, having applied the "clearly erroneous" rule of Rule 52(a) in its strictest and most uniformly accepted sense, a determination by this Court of the permissibility of a more liberal scope of review than that required by the Rule can clearly have no effect upon the decision in this case, and we submit that the Supreme Court should not be called upon to decide an issue beyond the limits of the controversy. This Court has declared in Rule 19 of its Rules that its discretionary power of review upon writ of certiorari will be exercised only when there are "special and important reasons" therefor. A question of solely academic interest and importance is clearly not within the scope of Rule 19.

This is clearly indicated by this Court's discussion of Rule 19 in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955), in which a writ of certiorari was dismissed as improvidently granted. In that opinion the Court pointed out (99 L. Ed. 891, 900):

> "This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which

may be deemed 'special and important' the Rule refers to cases

> 'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court.'

"A federal question may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. *But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.* (Magnum Import Co. v. Coty, 262 U. S. 159, 163, 67 L. Ed. 922, 924, 43 S. Ct. 531; see also address of Mr. Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v. vi.; Address of Mr. Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313. *'Special and important reasons imply a reach to a problem beyond the academic or the episodic.* . . ." (Emphasis added).

In the final analysis the most that could be accomplished as far as this controversy is concerned, (and what it actually sought by the petitioner) is to have this Court review the facts and evidence in this case and reverse the decision of the Circuit Court holding in effect that the findings of the District Court were clearly erroneous. We submit that the Supreme Court clearly should not exercise its discretion to grant a writ of certiorari for such a purpose in this case—a diversity negligence suit involving no question of construction or interpretation of any federal substantive law. It has long been the policy of the Supreme Court not to grant a writ of certiorari for the purpose of reviewing evidence and questions of fact. In *Southern Power Co. v. North Carolina Public Service Company*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413, a writ of certiorari was granted to review a judgment of the Circuit Court of Appeals for the Fourth Circuit modifying a judgment of the

District Court in a proceeding to compel the furnishing of electric current and power for certain public use. The Supreme Court dismissed the writ as improvidently granted, saying:

> "This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its re-examination that the decree would deprive petitioner of due process of law, and of freedom to contract, contrary to the Federal Constitution.
>
> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—primarily a question of fact. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto."

Similarly, in *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918), the Supreme Court, dismissing a writ of certiorari as improvidently granted, said:

> "After hearing arguments upon the issues involved in this cause it seems clear that the writ of certiorari was improvidently granted and must be dismissed. Furness, W. & Co. v. Yang-Tsze Ins. Assoc. 242 U. S. 430, 61 L. Ed. 409, 37 Sup. Ct. Rep. 141.
>
> "The controversy presented in an action at law is over title to a tract of land in Texas. Both parties claim under one Felder,—petitioners through a deed said to have been executed June 10, 1839, and respondents through one dated June 18, 1859.
>
> "As grounds for granting the writ, petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed, (2) whether it was presented for record before execution of the later one, (3) whether vendee in

the junior deed was a bona fide purchaser for value, (4) whether the junior deed was forged, and (5) whether the action was barred by the three years Statute of Limitations. *The propriety of submitting these matters depended essentially upon an appreciation of the evidence:* Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the circuit court of appeals reached the same result. 141 C. C. A. 264, 226 Fed. 434.

"The record discloses no sufficient reason within the rule long observed why we should review the judgment below. Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665. (Emphasis added).

Also quite pertinent here is the statement of the Supreme Court in *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922 (1922):

". . . The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals, was given for two purposes: first, to secure uniformity of decision between the courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing . . .*" (Emphasis added).

In the very recent case of *Rudolph v. United States*, 370 U. S. 265, 82 S. Ct. 1277, 8 L. Ed. 2d 484 (1962), as summarized in the reported opinion of this Court:

"An insurance agent and his wife brought suit in the United States District Court for the Northern District of Texas to recover federal income taxes paid on the value of a one-week trip, awarded to them for the agent's selling a predetermined amount of insurance, to a 2½ day convention in New York City of the offi-

cers and employees of the agent's employer, one morning of which was devoted to a business meeting and group luncheon, the remaining time being given over to travel, sight-seeing, entertainment, fellowship or free time. Finding that the primary purpose of the trip was to award a bonus for a job well done, the District Court denied recovery. (189 F. Supp.). The United States Court of Appeals for the Fifth Circuit affirmed, approving the lower court's findings. (291 F. 2d 841).

"The United States Supreme Court, after granting certiorari, dismissed the writ as improvidently granted."

In a *per curiam* opinion this Court held (8 L. Ed. 2d 484, 486):

"The petition for certiorari in this case was granted because it was thought to present important questions involving the definition of 'income' and 'ordinary and necessary' business expenses under the Internal Revenue Code, 368 U. S. 913, 7 L. Ed. 2d 130, 82 S. Ct. 195. An insurance company provided a trip from its home office in Dallas, Texas, to New York City for a group of its agents and their wives. Rudolph and his wife were among the beneficiaries of this trip, and the Commissioner assessed its value to them as taxable income. It appears to be agreed between the parties that the tax consequences of the trip turn upon the Rudolphs' 'dominant motives and purpose' in taking the trip and the company's in offering it. In this regard, the District Court, on a suit for a refund, found that the trip was provided by the company for 'the primary purpose of affording a pleasure trip . . . in the nature of a bonus, reward, and compensation for a job well done' and that from the point of view of the Rudolphs it 'was primarily a pleasure trip in the nature of a vacation . . .' 189 F. Supp. 2, 4, 5. The Court of Appeals approved these findings. 291 F. 2d 841.

Such, ultimate facts are subject to the 'clearly erroneous' rule, cf. Commissioner v. Duberstein, 363 U. S. 278, 289-291, 4 L. Ed. 2d 1218, 1227, 1228, 80 S. Ct. 1190 (1960), *and their review would be of no importance save to the litigants themselves.* The appropriate disposition in such a situation is to dismiss the writ as improvidently granted. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 78 note 2, 99 L. Ed. 897, 903, 75 S. Ct. 614 (1955). (Emphasis added).

Under the principles stated in the foregoing decisions there is no need for this Court to take upon itself in this case the entire question of the proper scope of appellate review under Rule 52(a), as sought by the petitioner. The decision of the Circuit Court here is correct under even the strictest view of the scope of that Rule, and the permissibility of a broader scope of review is not concerned in the present case. If such a question exists at all, it need not, and should not, be decided here.

III. THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT (Petitioner's Section 2).

There is no conflict between the decision of the Circuit Court in the present case and the decisions of this Court as to the proper scope of appellate review of inferences drawn from documents or undisputed facts.

The petitioner's second argument proceeds upon the same false assumption that the Circuit Court failed to find the District Court's findings of fact "clearly erroneous" within the meaning of Rule 52(a). There is nothing in the Circuit Court's opinion which conflicts with any principle announced or applied by the Supreme Court in *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948), or *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960), relied upon by the petitioner.

In the *Gypsum* case, this Court pointed out that Rule 52(a) was applicable to findings which were inferences from undisputed facts but pointed out further that a finding is "clearly erroneous" under Rule 52(a) "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Court, applying the stated test of "clearly erroneous," set aside numerous findings of the District Court.

In the *Duberstein* case, this Court, in two companion cases, was presented with the question of whether certain transfers of property and money were gifts excludable from the transferee's gross income under Section 22(b)(3) of the Internal Revenue Code of 1939. The Court again stated that Rule 52(a) applied to factual inferences from undisputed basic facts and, applying the "clearly erroneous" rule in accordance with the test set forth in the *Gypsum* case, found that under the evidence before it in the first of the two companion cases the findings of the District Court could not be said to be clearly erroneous. In the second of the two cases the majority of the Court held that the simple and unelaborated finding by the District Court that the transfer in question was a "gift" was insufficient for the Court to make a determination of the correctness of the finding and required further proceedings for the purpose of presenting adequate findings of fact.

Clearly neither the *Gypsum* case nor the *Duberstein* case holds that findings based upon factual inferences from undisputed evidence must be allowed to stand even where the inferences are not supported by substantial evidence or where the reviewing court finds from the entire evidence that an inference reached by the trial court based upon undisputed evidence is clearly in error. On the contrary, a review within those limits is entirely supported by both decisions through the application of the "clearly erroneous" rule under the test announced in the opinions.

This is precisely the review made by the Circuit Court in the present case, and under the evidence in this case the Circuit Court held that the findings of the District Court were required to be set aside.

After reviewing the evidence under the universally accepted test of "clearly erroneous," the Circuit Court determined (1) that there was no substantial evidence of negligence on the part of the driver of the automobile concerned as the proximate cause of the decedent's death and (2) that on the entire evidence it was convinced that a mistake had been committed by the trial court and that the decedent, as a matter of law, was guilty of negligence or wilfulness proximately causing his own death. No departure from this Court's definition of the "clearly erroneous" rule was involved.

If a review of this nature is held to be beyond the scope of Rule 52(a), no review of findings based upon inferences from undisputed facts will remain whatsoever and a new rule will be required that such findings are to be regarded as conclusive on appeal.

The petitioner's assertion, on page 11 of his Petition, that despite this Court's decision in the *Duberstein* case, there is still a conflict among the circuits as to the applicability of the "clearly erroneous" rule to findings of fact based on inferences from undisputed evidence, does not constitute a valid reason why this Court should grant certiorari in this case. This Court has already expressly determined and stated, clearly and definitely, that the "clearly erroneous" rule does apply to factual inferences based on undisputed evidence. In view of these rulings by this Court, the Supreme Court of the United States, any continued conflict among the circuits—if there is any—as to whether the "clearly erroneous" rule applies to factual inferences from undisputed evidence is simply unjustifiable. This Court should not be called upon to exercise its discretion to grant a writ of certiorari in this case merely to repeat the position which it has clearly taken in the past and from which

it has never departed—particularly where, as here, the Circuit Court concerned has not transgressed the rule laid down by this Court.

No further decision on this point and no warning to the Circuit Court concerned here, are needed.

IV. THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH APPLICABLE STATE LAW (Petitioner's Section 3).

The Petitioner's assertion that the decision of the Circuit Court here is in conflict with applicable decisions of the South Carolina Supreme Court is simply not so and constitutes argument unworthy of the dignity of this Court.

Indeed the exact reverse is true. The trial court overlooked or disregarded clearly applicable South Carolina statutes and decisions of the South Carolina Supreme Court and of the United States Court of Appeals for the Fourth Circuit applying South Carolina law. The Circuit Court, realizing this, merely applied the correct law and, in so doing, necessarily reversed the decision of the trial court.

We respectfully submit that the decision of the Circuit Court is entirely in accord with all pertinent decisions and statutes embodying South Carolina law. See, for example, the following:

Miller v. East Georgia Motors, Inc., 303 F. 2d 488 (CCA 4, 1962) (reversing a similar decision by the same trial judge concerned here);

Smith v. Biggs, 223 F. 2d 839 (CCA 4, 1955), cert. denied 351 U. S. 912, 76 S. Ct. 701, 100 L. Ed. 1446;

Williams v. Ford, 233 S. C. 304, 104 S. E. 2d 378 (1958);

Carma v. Swindler, 228 S. C. 550, 91 S. E. 2d 254 (1956);

Attaway v. One Chevrolet 5-P Truck, 228 S. C. 559, 91 S. E. 2d 270 (1956);

Thompson v. Washington, 206 F. 2d 147 (CCA 4: 1947);

Wright v. South Carolina Power Co., 205 S. C. 327; 31 S. E. 2d 904 (1944);

Lee v. New South Express Lines, 192 S. C. 527, 7 S. E. 2d 459 (1940);

Craig v. Clearwater Mfg. Co., 189 S. C. 176, 200 S. E. 765 (1938);

Moseley v. Southern Ry. Co., 164 S. C. 193, 162 S. E. 94 (1932).

See also the very recent case of *Hopkins v. Reynolds, et al.*, Smith's Advance Sheets, February 29, 1964 (not yet reported).

Every case cited by the petitioner reaching an opposite result from that reached in the above cases simply involves different evidence requiring a different result. They do not state different principles of law.

The petitioner's attempt to distinguish *Smith v. Biggs, supra*, and *Williams v. Ford, supra*, is totally without merit. In all relevant respects both cases are identical to the present case.

The petitioner states that *Smith v. Biggs* is not applicable here because there the occurrence took place in the defendant's proper lane of travel, whereas, here the respondent was on the wrong side of the center line when the decedent was struck. This is childish argument. The uncontradicted evidence here, from the petitioner's own witnesses, indicates beyond question that the automobile which struck the decedent was in its proper lane when the decedent appeared in the highway in its path and that the driver turned to the left in a desperate effort to avoid striking him.

The petitioner states that *Williams v. Ford* is not applicable here because there the defendant explained his presence on the wrong side of the road, whereas here the respondent offered no explanation as to his driving on the left of the center line. This is even worse. The petitioner's

own evidence clearly shows why the driver of the automobile which struck the decedent veered over the center line momentarily. The respondent's own explanation is even simpler: he was not there at all.

The petitioner's attempt to bring in the "public health, safety and welfare of the people of the State of South Carolina" as a reason for this Court to exercise its discretion to review the evidence in this case is wholly without merit. The petitioner apparently bases this argument on the hit-and-run aspect of the case. This is the same approach he tried unsuccessfully in the Circuit Court, i.e., to convince the Court by a series of unfortunate circumstances, coincidences, and conjectures, and inferences mounted on inferences, that the automobile which caused the decedent's death belonged to the respondent, in the apparent hope that by thus connecting the respondent, to some degree at least, with an unfortunate tragic accident, he could persuade the Court to overlook the lack of evidence of the real elements of his case, and the overwhelming evidence that the decedent was clearly responsible for his own death in trying to cross an open highway in the middle of the night in the path of two or more clearly visible oncoming automobiles.

We are confident that this Court will not be so easily misled.

The respondent obviously cannot be held responsible, morally or legally, for the tragic consequences of a hit-and-run accident until it has been proved by substantial evidence that *he* was the driver of the hit-and-run automobile. We submit that the evidence in this case, including the evidence from the petitioner's own witnesses, indicates exactly the reverse, i.e., that the respondent was *not* the driver of the automobile in question, and that the Circuit Court would have so decided had it found it necessary to reach this question.

CONCLUSION

We respectfully submit that none of the "special and important reasons" required by Rule 19 for an exercise of this Court's discretion to grant a writ of certiorari to review a decision by a Circuit Court of Appeals are present in this case.

The only questions involved in this case, now or at any earlier stage of the proceedings, are the sufficiency of the evidence on the factual questions concerned: the identity of the driver of the automobile which struck the decedent, the presence or absence of negligence or wilfulness on the part of the driver (whoever he was) as the proximate cause of the decedent's death, and the presence or absence of negligence or wilfulness (contributory or sole) on the part of the decedent.

These are all simply evidentiary questions which this Court, with all the questions of real significance before it for decision, ought not to be asked to review.

The decedent's beneficiary has already had three bites at the apple: once in the original state court action in 1957-1958, once before the District Court in the present case, and once before the Circuit Court. No further opportunities for a rehash of the evidence in this case are justified or deserved.

We respectfully submit that the writ of certiorari sought by the petitioner should be denied.

Respectfully submitted,

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March 28, 1964.

MOTION FILED

JUN 3 1964 SUPREME COURT U. S.

Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., ADMINISTRATOR OF THE ESTATE OF [redacted] McGEE, PETITIONER,

versus

EDMUND A. COLE, RESPONDENT

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., ADMINISTRATOR OF THE ESTATE OF L. T. McGEE, PETITIONER,

versus

EDMUND V. COLE, RESPONDENT

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

(A). MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on April 20, 1964. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of this Court in *Mercer v. Theriot*, decided May 4, 1964, and reported in 84 S. Ct. 1157, is in direct conflict with that of the Court of Appeals for the Fourth Cir-

cuit in this case; and although comparable in all material respects to the case at bar, it reaches an exactly opposite result. This petition for rehearing is filed after the expiration of the time prescribed in Rule 58. It is therefore based upon the ground that the new and controlling decision of this Court in *Mercer v. Theriot, supra*, was decided subsequent to the denial of the petition for certiorari in this case and did not come to the attention of petitioner or his counsel until it was reported in the May 15, 1964, issue of West Publishing Company's Supreme Court Reporter which did not reach petitioner or his counsel until May 26, 1964. Under the circumstances, this Court clearly has power, in its discretion, to entertain the petition. *Zap v. United States*, 330 U. S. 800; *Land v. Dollar*, 343 U. S. 973, 341 U. S. 737.

HENRY HAMMER,
HENRY H. EDENS,
Attorneys for Petitioner.

May 28, 1964.

(B). PETITION FOR REHEARING

Petitioner prays that this Court grant a rehearing of its order of April 20, 1964, and that a writ of certiorari issue to reverse the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed March 7, 1964, herein.

On May 4, 1964, this Court rendered a decision in *Mercer v. Theriot*, 84 S. Ct. 1157, in which the facts are comparable in all material respects to those in the present case. It will be noted that both cases are wrongful death actions involving "hit and run" drivers, that the body of deceased in each case was found on the portion of the highway where it was negligent for the vehicles to be driven thereon, that tire marks in each case were near the body,

that each of the vehicles bore marks of a recent blow, and particles found on each car evidenced the involvement of the vehicles in striking down pedestrians.

It is thus evident that the facts in *Mercer v. Theriot, supra*, are comparable to those in the present case, and even though there are additional facts in the present case which are more compelling and cogent in establishing liability, an exactly opposite result was reached by the Court of Appeals for the Fourth Circuit in the instant case. This Court, in reversing the Court of Appeals for the Fifth Circuit in *Mercer v. Theriot, supra*, expressly recognized that evidence of the nature adduced in both cases was sufficient to sustain a verdict against a "hit and run" driver. It said:

> "The evidence was sufficient under any standard which might be appropriate—state or federal. See *Dick v. New York Life Insurance Co.*, 359 U. S. 431, 444-445; 79 S. Ct. 921, 925-926, 3 L. Ed. (2d) 895."

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

HENRY HAMMER,
HENRY H. EDENS,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, we hereby certify that the foregoing petition for rehearing and the accompanying motion for leave to file are presented in good faith and not for delay, and are restricted to the grounds specified in paragraph 2 of Rule 58.

HENRY HAMMER,
HENRY H. EDENS,
Attorneys for Petitioner.

SUPREME COURT, U.S.
FILED
JUN 20 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., Administrator of the Estate of L. T. McGee, *Petitioner,*

versus

EDMUND Y. COLE, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., Administrator of the Estate of L. T. McGee, *Petitioner*,

versus

EDMUND V. COLE, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

STATEMENT

On January 27, 1961, the petitioner instituted an action in the United States District Court for the Eastern District of South Carolina, Columbia Division, to recover damages for the death of petitioner's intestate in the middle of the highway in the middle of the night on May 13, 1956, alleged to have been caused by the negligence and wantonness of the respondent in the operation of his automobile. Jurisdiction was based upon diversity of citizenship. The case was tried by the Court without a jury November 7-9, 1962, and resulted in a judgment for the petitioner (217 F. Supp. 280).

On January 7, 1964, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that there was no substantial evidence to support the findings of the District Court with respect to negligence and contributory negligence and that the evidence established that the deceased was guilty of contributory negligence as a matter of law (326 F. 2d 967).

A petition for rehearing filed by petitioner was denied by the Court of Appeals on February 10, 1964.

Petitioner thereafter filed with this Honorable Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. On April 20, 1964, this Court entered its Order denying certiorari.

On June 1, 1964, after the expiration of the time prescribed in Rule 58 of the Rules of this Honorable Court for the filing of a petition for rehearing, the petitioner served upon respondent a Motion for Leave to File Petition for Rehearing of the Order denying the petition for certiorari. The ground stated by petitioner as the basis of his Motion is "that the new and controlling decision of this Court in *Mercer v. Theriot*, *supra*, 84 S. Ct. 1457, was decided subsequent to the denial of the petition for certiorari in this case and did not come to the attention of petition or his counsel until it was reported in the May 15, 1964, issue of West Publishing Company's Supreme Court Reporter, which did not reach petitioner or his counsel until May 26, 1964".

A more detailed statement of the facts of this case is contained in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari.

STATUTES AND RULES INVOLVED

This Motion involves Rule 58 of the Revised Rules of the Supreme Court of the United States, the pertinent provisions of which are set forth below:

> "*Rule 58. Rehearings.*
>
> "1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be

supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; . . . A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

"2. *A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time*, printing, number of copies furnished, manuscript signature to certificate, and service, *as provided in paragraph 1 of this rule*. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 34, footnote 1, 50 S.Ct. 9, 10; Massey v. United States, 291 U.S. 608, 54 S.Ct. 532), or to other substantial grounds available to petitioner although not previously presented (e. g., Schaiber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50, 59 S.Ct. 8, 9). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

" * * *

"4. Consecutive petitions for rehearings, and *petitions for rehearing that are out of time under this rule, will not be received.*" (Emphasis added).

QUESTION

Should the petitioner be permitted to file a petition for rehearing of the Order of this Court denying the petition for certiorari in this case after the expiration of the time prescribed therefor in Rule 58 of the Supreme Court Rules.

without the intervention of any matter pertinent to the basis upon which certiorari is sought?

ARGUMENT

I. PETITIONER'S MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING IS IN DIRECT CONFLICT WITH THE PROVISIONS OF RULE 58 OF THIS COURT.

It is apparent upon examination of petitioner's Motion for leave to file a petition for rehearing of the Order of this Court entered on April 20, 1964, denying the Petition for Writ of Certiorari, that the petitioner's Petition for rehearing is out of time under the provisions of Rule 58 of this Court and that the petitioner has failed to advance any valid reason or supply this Court with any applicable authority to support his request for such rehearing after the expiration of the time prescribed in Rule 58. On the contrary, it is respectfully submitted that an analysis of the grounds upon which petitioner relies in his Motion clearly reveals that the requested departure from the express provisions of the Rule in the instant case is unwarranted and should not be granted.

In adopting Rule 58 on July 1, 1954, this Court expressly imposed a necessary and desirable finality upon its orders denying writs of certiorari, by the inclusion of a provision, not theretofore contained in the Rules of the Supreme Court, which provides that "consecutive petitions for rehearings, and *petitions for rehearing that are out of time under this rule, will not be received*" (Rule 58 (4)). (Emphasis added). This Court has of course consistently recognized the necessity for maintaining a close guard upon the finality of litigation. In *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943), holding that the time allowed under the Federal statutes for appeal from a judgment of a State court to the Supreme Court of the United States was not extended by the period of the pendency of an unsuccessful applica-

tion to a judge of the State court for allowance of an appeal, the Court pointed out (319 U.S. 412, 415):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

Similarly, in *Federal Trade Commission v. Minneapolis Regulator Company*, 344 U. S. 206, 73 S. Ct. 245, 97 L. Ed. 245 (1952), which came before the Supreme Court of the United States on a writ of certiorari to review a judgment reversing an Order of the Federal Trade Commission, the Supreme Court, in dismissing the writ as not timely, pointed out (344 U. S. 206, 213):

> "Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end."

In the present case, petitioner's motion for leave to file an untimely petition for rehearing is based merely upon the ground that a decision of this Court, *Mercer v. Theriot*, 81 S. Ct. 1157, which petitioner erroneously contends is "controlling" and "comparable in all material respects to this case" (but see Section II hereinbelow), was decided subsequent to the denial of the Petition for a writ of certiorari in this case. Such a position in the present case is clearly in conflict with the express provision of Rule 58 and with the basic principles of finality of litigation upon which the Rule is based.

The present case is a diversity automobile accident action with its own peculiar, and relatively unusual, facts. It is only to be expected that other negligence suits will arise from time to time with some factual similarities to the present case. It is also to be expected that, for any number

of reasons under the facts and circumstances of the particular case, opposite results may well be reached in various cases even though they may bear some factual similarity to each other. Indeed, regardless of result, it is extremely difficult to find two automobile-pedestrian negligence suits which do not have *some* common feature.

It is clear, however, that the Supreme Court should not be called upon to review decisions when they have become final through the passage of the prescribed period of time, in order that those decisions may be viewed in the light of all subsequent decisions which have been decided upon their own facts, yet are alleged to be in conflict with the prior decisions concerned. If such a procedure were adopted by this Court in negligence suits, there could never be a confidest end to such suits. It would be virtually impossible to establish and define an effective standard to determine the sufficiency or insufficiency of the similarity of the facts or circumstances in the cases as they arise which could be fairly applied to determine whether each new decision of this Court requires reopening all of the hundreds or thousands of prior decisions involving somewhat similar facts.

Nor could there be a fair stopping point with respect to the passage of time. *If a case is to be in effect reopened in order to consider its alleged similarity with a case that happens to have been decided two weeks later, then logically the same policy should apply in the case of decisions handed down a month later, or a year later, or five years later, or at any time in the future*, and cases must lie in a vast and in doubt, forever, possibly to be reopened for the same reason a month later, or a year later, or five years later, or simply indefinitely.

Under such a rule there could never be a certain end to litigation. No procedure more destructive to the principle of finality of litigation can be imagined.

In the present case, after the expiration of the 25-day period allowed by Rule 58 for the filing of a petition for

rehearing, an order was entered by the District Court cancelling the judgment previously entered. Final fees were paid, thank-you letters were written, preparations were made for the withdrawal of certain exhibits from the record for return to their owners, and the case was otherwise brought to what all concerned thought was a final conclusion. All of these things must now be undone if the case is reopened.

This Court is of course fully empowered to relax the requirements of Rule 58 in instances where fairness and justice require it. It is to be noted, however, that although this Court has on occasion permitted untimely applications for rehearing or reconsideration of its orders to effect a just result in criminal proceedings, to correct errors in the Court's own mandates, or to insure the uniform application of a Federal substantive law, *examination of the decisions of this Court since the adoption of Rule 58 fails to reveal any instance in which an untimely application for rehearing has been granted in a situation comparable to the present case.*

In fact, in the case of *United States v. Ohio Power Co.*, 353 U. S. 98, 77 S. Ct. 652, 1 L. Ed. 2d 683 (1957), a tax case involving considerations different from those here involved, the dissenting opinion of Mr. Justice Harlan, with whom Mr. Justice Frankfurter and Mr. Justice Burton joined, points to the numerous occasions subsequent to the adoption of Rule 58 on which the Supreme Court has denied untimely applications for rehearing despite the claimed development of a conflict subsequent to the initial order. See *Fracey v. Studebaker Corp.*, 348 U. S. 939, 75 S. Ct. 354, 99 L. Ed. 736; *Powell v. United States*, 348 U. S. 939, 75 S. Ct. 357, 99 L. Ed. 736; *Cuckes Pub. Co. v. NLRB*, 348 U. S. 960, 75 S. Ct. 448, 99 L. Ed. 749; *Jones v. Lykes Bros. S. S. Co.*, 348 U. S. 960, 75 S. Ct. 447, 99 L. Ed. 749; *Lamprey v. United States*, 349 U. S. 969, 75 S. Ct. 879, 99 L. Ed. 1290; *Mogiakota Gas Co. v. Montana-Dakota Utilities Co.*, 349 U. S. 969, 75 S. Ct. 878,

99 L. Ed. 1290; *Zientek v. Reading Co.*, 350 U. S. 960, 76 S. Ct. 345, 100 L. Ed. 834; *Preferred Ins. Co. v. United States*, 351 U. S. 990, 76 S. Ct. 1044, 100 L. Ed. 1502; *International Molders & Foundry Union v. Western Foundry Co.*, 352 U. S. 860, 77 S. Ct. 22, 1 L. Ed. 2d 70; *Mekdeschick v. United States*, 352 U. S. 977, 77 S. Ct. 351, 1 L. Ed. 2d 330; *Consolidated Edison Co. of N. Y., Inc. v. United States*, 352 U. S. 1019, 77 S. Ct. 552, 1 L. Ed. 2d 562.

The cases of *Zap v. United States*, 330 U. S. 800, 67 S. Ct. 857, 91 L. Ed. 1259 (1947), and *Land v. Dollar*, 341 U. S. 737, 71 S. Ct. 987, 95 L. Ed. 1331 (1951), cited by petitioner in support of his motion, clearly have no application to the present situation. Both of such cases were decided prior to the adoption of the provision now included in Rule 58(4) expressly providing that untimely petitions for rehearing will not be received. Furthermore, in *Land v. Dollar*, *supra*, the Supreme Court merely continued on the docket a belated "Motion for leave to file a motion for reconsideration" of a denial of certiorari, without taking any action thereon, so that there would be no question of the Court's control over the case for "whatever action the Court may deem appropriate" (341 U. S. 737, 738). The continuance was ordered in an opinion filed with respect to related litigation in which writs of certiorari were granted, with the hearings thereon being postponed. After a second continuance, however (343 U. S. 737), the motion for leave to file a motion for reconsideration was ultimately withdrawn (344 U. S. 807, 73 S. Ct. 4, 97 L. Ed. 628). *Zap v. United States*, *supra*, was a criminal case involving considerations of fairness and justice not found in civil cases.

It is respectfully submitted that in the present case, an ordinary negligence suit for money damages, which this Court has declined to review after full consideration of the questions presented, no considerations of fairness or justice are present to justify a departure from the Court's established procedure.

II. THE DECISION IN THE CASE OF MERCER V. THERIOT CITED BY PETITIONER IS NOT APPLICABLE TO THE PRESENT CASE.

The sole ground for petitioner's Motion for leave to depart from the time requirement of Rule 38 is the subsequent rendition of this Court's decision in *Mercer v. Theriot*, 84 S. Ct. 1157, which petitioner alleges is "controlling" on this case.

We submit, however, that the *Mercer* decision does not in any way control or conflict with the decision of the Circuit Court of Appeals in this case or bear in any manner upon this Court's denial of the petitioner's original Petition for certiorari.

One of the most important features of the present case—perhaps the most important single feature—is the defense of contributory negligence interposed by the respondent. The Circuit Court of Appeals in the present case reached its decision not only upon the ground that the evidence failed to support the District Court's findings of negligence, *but also upon the independent ground that the evidence required a finding that the deceased was guilty of contributory negligence as a matter of law.* In *Mercer v. Theriot* no question of contributory negligence was considered whatsoever. There was no evidence of contributory negligence involved, and the defense of contributory negligence was not argued on appeal or discussed by the Court.

It is clear, therefore, that the case of *Mercer v. Theriot* cannot be considered "controlling" or as "comparable in all material respects to the case at bar", as respondent asserts in his Motion for an untimely hearing.

Furthermore, it is clear that the case of *Mercer v. Theriot* has no application whatsoever to the question of whether this Court should grant certiorari in the instant case. This Court does not, of course, grant certiorari except where there are "special and important" reasons therefor as set out in Rule 19 of the Rules of this Court. It is apparent from the decision in *Mercer v. Theriot* that cer-

tiorari was granted in that case because it appeared that the question was presented whether a *State* or *Federal* standard determines the sufficiency of the evidence to support a jury verdict in cases in the District Courts where jurisdiction is based on diversity of citizenship. *There is clearly no semblance of such a question in the instant case.* No conflict in State and Federal standards with respect to the sufficiency of the evidence has been shown or even alleged in this case. The Court of Appeals in the instant case merely applied the ordinary and customary rules relating to the review of findings of the trial judge in non-jury cases pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and found that there was no substantial evidence to support the findings of the District Court with respect to negligence and contributory negligence. *The decision of the Court of Appeals is clearly in accord with applicable State and Federal decisions.* See e.g. *Carina v. Swindler*, 228 S. C. 550, 91 S. E. 2d 254 (1956); *Hopkins v. Reynolds*, S. C. , 135 S. E. 2d 75 (1964); *Wright v. South Carolina Power Co.*, 205 S. C. 327, 31 S. E. 2d 904 (1944); *Attaway v. One Chevrolet 5-Ton Truck*, 228 S. C. 559, 91 S. E. 2d 270 (1956); *Smith v. Biggis*, 223 F. 2d 839 (CCA 4, 1955), cert. denied, 351 U. S. 912, 76 S. Ct. 701, 100 L. Ed. 1446; *Miller v. East Georgia Motors, Inc.*, 303 F. 2d 488 (CCA 4, 1962); *Thompson v. Washington*, 206 F. 2d 147 (CCA 4, 1947).

This Court has considered fully the reasons advanced by petitioner for the Court to exercise its discretion to grant a writ of certiorari, and has declined to grant the writ. The subsequent decision of this Court in *Mercer v. Theriot* clearly does not add support to any of the reasons asserted by petitioner initially or supply any additional grounds upon which the Court should now, belatedly, exercise its discretion. No "special and important" reasons for the granting of a review on writ of certiorari within the provisions of Rule 19 applicable to the instant case are created or supported by the decision in *Mercer v.*

Theriot. There is no substantial Federal question involved as a result of that decision. No conflict is created between decisions of the circuit courts on a similar matter. No important State question applicable to this case is involved, nor any conflict of a circuit court with applicable State law. No departure from the accepted and usual course of judicial proceedings is involved.

It is therefore submitted that the subsequent decision of *Mercer v. Theriot* clearly should not be considered a valid reason for this Court to permit the petitioner to escape the requirements of Rule 38.

In the final analysis, it is apparent that the petitioner is asking this Court to permit a departure from its Rules merely because of a decision rendered subsequent to the denial of certiorari in this case which the petitioner finds to have minor similarities in some of the facts and which finally resulted in a judgment in favor of the plaintiff rather than the defendant. Ignoring the basic dissimilarity of the decision in *Mercer v. Theriot* from the aspects of the instant case pertinent here, and the purpose for which this Court granted certiorari in *Mercer v. Theriot* in the first instance, the petitioner asks this Court to parallel the evidence in the two cases and reconsider its decision to deny certiorari in this case, *not* because of any special or important matter which requires consideration by this Court, but simply to review the evidence in the present case in the light of the evidence in the *Mercer* case. Having (properly) been refused entrance to this Court through the front door, the petitioner is now trying to slip in through the side door to persuade this Court to review the evidence a third time. As previously discussed in respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, however, it is not the policy of this Court to grant certiorari merely to review the evidence or to give the defeated party in the Circuit Court of Appeals another hearing. *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918); *Magnum*

Import Co. v. Cotg, 362 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1922); *Rudolph v. United States*, 370 U. S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484 (1962).

After full consideration of the matter, this Court has denied certiorari in this case and no petition for rehearing has been filed within the time prescribed by the Rules. We respectfully submit that the petitioner clearly should not be permitted to file a petition for rehearing after the expiration of the prescribed time in reliance upon a subsequent decision in a case reviewed by this Court on a different question and involving different evidence. We submit that the grounds upon which the Motion for leave to file an untimely petition for hearing is submitted are without merit and the petitioner's Motion should be denied.

CONCLUSION

We respectfully submit that the policy of this Court to protect the right of litigants to consider their case at an end at some definite point of time and to insure adherence to the principle of finality of litigation should be applied in this case and the Rules of this Court enforced. The position advanced by the petitioner for leave to file an untimely petition for rehearing in this case is clearly impracticable and is not supported by any reasons of fairness or justice for which this Court should be moved to relax the express requirements of Rule 58.

For the reasons and upon the authorities discussed hereinabove, we submit that the petitioner's Motion to file a petition for rehearing of this Court's Order denying certiorari in this case is clearly without merit, and we respectfully ask that it be denied.

Respectfully submitted,

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